No. 84-1580

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH INADI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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I.

Respondent has not answered any of the principal points made in our opening brief. Respondent has not disputed any of the historical facts that, in our judgment, lead to the conclusion that the Confrontation Clause was not intended as a general regulation of the admission of hearsay. Respondent has interpreted this Court's Confrontation Clause cases in a way that would revolutionize the law of evidence and that we do not believe this Court could have intended. And, perhaps most important, respondent has failed to explain what practical benefit defendants would derive from the rule adopted by the court of appeals. In particular, respondent's brief does not contain even a hint of an answer to the common sense question that jumps out from this case: If respondent really wanted to question the co-conspirator/declarant John

Lazaro, whose whereabouts were known to the defense, why didn't respondent subpoena him? Respondent's brief is written as if trial subpoenas were unknown and the Compulsory Process Clause did not exist.

A. The Historical Evidence

In our opening brief (at 12-24), we reviewed the history of the confrontation right, the hearsay rule, and the framing and adoption of the Sixth Amendment, and we made the following points:

> 1. The right to confrontation grew up to prevent the practice of trial by affidavit or deposition. There is no evidence that this right was intended generally to regulate the admission of hearsay.
>
> 2. Many exceptions to the hearsay rule were recognized before the adoption of the Sixth Amendment, and the co-conspirator rule developed at approximately the same time as the adoption of the Bill of Rights.
>
> 3. There is no evidence that the framers of the Sixth Amendment intended to alter or extend the right to confrontation as it was then commonly understood; in particular, there is no evidence that the framers intended the Confrontation Clause to abrogate hearsay exceptions or generally to regulate hearsay.
>
> 4. For nearly 200 years, it has been accepted that certain out-of-court statements, including co-conspirator statements, are admissible—if they satisfy various other, carefully drawn conditions—whether or not the declarant is available to testify.

Respondent's brief contains no historical evidence refuting any of these points. This is obviously revealing because we believe that these points strongly suggest the conclusion that the Sixth Amendment was not intended either to bar the admission of all hearsay or to serve as a general standard for the regulation of hearsay. Had the framers of the Sixth Amendment intended to alter the confrontation right so as to achieve such results, there would surely have been some discussion or debate. Moreover, if the framers had harbored such an intention, it seems most unlikely that this would have completely escaped the notice of or been ignored by the judges and practitioners of the era and have come to light only in the last few years. See *United States* v. *Ross*, 456 U.S. 798, 819 (1982) ("The fact that no such argument was even made illuminates the profession's understanding of the scope of the [right in question].").

Although respondent discusses (Br. 9-14) the historical materials, it is difficult to tell what he makes of them. He points (Br. 9-10) to the fact that Hale and Blackstone did not expressly reject application of the right to confrontation to regulation of the admission of hearsay. However, the most plausible conclusion to be drawn from this omission is not that these authorities endorsed the proposition that the confrontation right generally regulates hearsay or even that they entertained doubts on the subject. Rather, the most plausible conclusion—indeed, we would say the only plausible conclusion—is that such an interpretation of the confrontation right did not even occur to them. After all, both the confrontation right and the admission of hearsay pursuant to exceptions to the hearsay rule were well recognized at the time, and it was the practice then, as it has been ever since, to admit certain types of hearsay without inquiring whether they met special requirements stemming from the confrontation right.

Respondent suggests (Br. 11) that it is impossible to determine what the framers of the Sixth Amendment meant by the right to confrontation. For reasons already touched upon, however, this argument does not support the decision below. It is true, as we noted in our opening brief (at 17-18), that the Confrontation Clause produced little discussion or debate in Congress and in the state legislatures during ratification. As a result, it is probably not possible to discern the intent of the framers on some fine points of Confrontation Clause jurisprudence. But with respect to the broad question implicated in the present case—whether the Confrontation Clause was meant as a general standard for regulating hearsay—the silence of the framers can indicate only one answer, for it simply is not credible that the framers dramatically changed the settled meaning of the confrontation right without leaving any hint in the historical record. Thus, even were respondent correct that we have shown nothing more than that the dog did not bark, one need hardly be a Sherlock Holmes to find meaning in that silence. [1]

[1] Respondent also contends (Br. 11) that our opening brief gave "short shrift" to "the historical function of the right of confrontation," which respondent seems to identify as providing an opportunity for cross-examination and assessment of the witness's demeanor. There can, of course, be no doubt that these are the broad purposes underlying the right of confrontation, but it is an enormous leap from these broad purposes to the rule adopted by the court of appeals in the present case. The opportunity for cross-examination and assessment of demeanor are restricted whenever a court admits a hearsay statement made by a non-testifying declarant. It must follow, therefore, either (a) that all hearsay is barred by the Confrontation Clause (a conclusion at war with the last several centuries of Anglo-American evidence law and practice) or (b) that there are valid exceptions to the general principle that persons whose statements are introduced as evidence in criminal cases should be available for cross-examination and assessment of demeanor. Since there must be such exceptions, respondent's argument is not at all advanced by the recitation of the broad purposes served by the confrontation right.

B. The *Roberts* Dictum

In our opening brief, we argued that this Court's Confrontation Clause cases disclose a three-part approach to the admission of hearsay. First, the Court has closely regulated the admission of those types of hearsay—chiefly former testimony—that are analogous to affidavits and depositions, the forms of proof that the confrontation right was historically intended to restrict. Second, the Court has treated evidence falling within settled and tested exceptions to the hearsay rule as presumptively valid. Third, as is illustrated by *Dutton* v. *Evans*, 400 U.S. 74 (1970), which involved a state variation of the traditional co-conspirator rule, the Court has held out the possibility of more exacting scrutiny of novel departures from traditional hearsay principles.

Disagreeing with this analysis, respondent instead reads *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and other cases involving the admission of former testimony as articulating Confrontation Clause principles that apply to all hearsay exceptions and not just the exception for former testimony (see Resp. Br. 18-28). Respondent expresses amazement (Br. 26-27) at our argument that this Court's cases dealing with the admission of former testimony are—of all things—about the admission of former testimony. Clearly respondent's position is contrary to basic principles regarding the interpretation of judicial opinions. Presumably respondent would agree that the *holdings* of the former testimony cases appl only to the admission of former testimony. Thus, respondent's position must be that dictum in these cases was intended to

settle the application of the Confrontation Clause, not just to the single exception for former testimony, but to the more than 30 commonly recognized exemptions from and exceptions to the hearsay rule (see Fed. R. Evid. 801, 803, 804). However, it seems to us completely implausible to suggest that this Court announced Confrontation Clause principles of such general applicability and importance based upon an examination of a single hearsay exception, which, not coincidentally, happens to be the one that most precisely conforms to the purpose of the Confrontation Clause.

In the end, the analysis espoused by respondent and the court of appeals rests almost entirely upon the dictum from *Ohio* v. *Roberts*, 448 U.S. at 65, that "[i]n the usual case * * *, the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Respondent reads this dictum as the final word on the meaning of the Confrontation Clause with regard to the availability of hearsay declarants. Respondent states (Br. 20): "[b]y its terms, the *Roberts* rule of unavailability applies to all out-of-court declarations, whether or not they fall within traditional hearsay exceptions." Respondent reiterates (Br. 28): "[The *Roberts*] rule of necessity applies to all out-of-court declarations." The invalidity of this reading of *Roberts* is illustrated by the conclusion to which it leads, namely, that the 23 specific hearsay exceptions in Fed. R. Evid. 803, none of which requires proof of the declarant's unavailability, cannot constitutionally be used by the prosecution in a criminal case. As we noted in our opening brief (at 26-27), we do not believe that the *Roberts* court could have intended to embrace such a revolutionary proposition in dictum, without briefing or argument

directed to this broad question, and without careful elaboration in its opinion.

Moreover, reading a requirement of unavailability into the Rule 803 exceptions would be nonsensical. Those exceptions generally apply to types of out-of-court statements that, like co-conspirator declarations, have probative value quite independent of any testimony that the declarant might later give in court. For example, an excited utterance—"He hit the pedestrian without even braking!"—obviously has probative significance quite different from any subsequent testimony given by the declarant at a time when the potential consequences of such a statement may influence, or may be thought to influence, his story. To take another, exceptionally important example, live testimony is patently no substitute for regularly kept business records (Fed. R. Evid. 803 (6)).

Although respondent acknowledges (Br. 20) that "[b]y its terms, the *Roberts* rule of unavailability applies to all out-of-court declarations," respondent understandably draws back from the plain implication of this proposition, *i.e.*, that Rule 803 is unconstitutional in substantial part. Respondent suggests (see Br. 20 n.7, 32-35) that proof of unavailability may not be necessary for some or all of the Rule 803 exceptions because hearsay falling within those exceptions has been judged to be particularly reliable. By contrast, respondent maintains (see Br. 14-18), the co-conspirator rule is not based on a judgment about reliability but on principles of agency. In our view, respondent has substantially oversimplified the basis for the co-conspirator rule,[2] but in any event it

[2] Respondent's explanation (Br. 14-18) of the basis for the co-conspirator rule is a misleading oversimplification. In our

view, the co-conspirator rule is supported by three rationales. Although each rationale does not apply to every statement falling within the co-conspirator rule, these three rationales, when taken together, fully support the rule.

First, many co-conspirator statements bear special hallmarks of reliability. As the Seventh Circuit recently explained (*United States* v. *Molt*, 772 F.2d 366, 368-369 (1985)):

> The declarations of conspirators are * * * contemporaneous statements in an ongoing business relation. * * *
>
> [These] declarations are reliable in the same sense that contracts or negotiations among legitimate business partners usually portray accurrately the affairs of those involved. * * *

Second, a high percentage of co-conspirator statements are relevant for non-hearsay purposes. To that extent at least, they are plainly not subject to Confrontation Clause regulation. See *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985). Indeed, many contain no assertions of fact and thus cannot be hearsay. See Fed. R. Evid. 801(c). Other co-conspirator statements, although containing assertions of fact, could be admitted for non-hearsay purposes. Thus, if there were no co-conspirator rule, courts would have to examine very carefully each sentence of a conspiratorial conversation, would have to decide many difficult questions under Fed. R. Evid. 403, and would have to give many potentially confusing limiting instructions.

Finally, there are circumstances in which principles of agency support the admission of co-conspirator statements, *i.e.*, circumstances in which the statement of one conspirator may realistically be viewed as an admission of a co-conspirator. A party's admission is exempted from the hearsay rule because the party can always dispute the accuracy of his own alleged statements. See Fed. R. Evid. 801 advisory note. Likewise, when a co-conspirator/declarant remains in league with the defendant at the time of trial, it makes sense to regard the declarant's statement as the defendant's admission because it often lies within the defendant's power to put on testimony by the declarant disavowing or explaining his alleged prior statements.

is difficult to see how respondent's distinction can be squared with the literal reading of the *Roberts* dictum upon which respondent's entire argument—and the decision of the court of appeals—depends. The *Roberts* dictum states (448 U.S. at 65 (emphasis added)) that "[t]he Confrontation Clause operates in *two separate ways* to restrict the range of admissible hearsay." After making the previously discussed comment about unavailability, the Court observed (*ibid.* (emphasis added)): "The second aspect [*i.e.*, reliability] *operates once a witness is shown to be unavailable.*" Clearly, it is a radical departure from this language to collapse these two requirements into one, as respondent suggests might be done to salvage Rule 803. Thus, unless the *Roberts* dictum is read, as we believe it should be, to refer primarily to the hearsay exception at issue in that case and in the precedents on which the *Roberts* court relied (*i.e.*, the exception for former testimony), that dictum must lead to results that the Court cannot possibly have intended.

In addition, respondent's explanation for the co-conspirator exception—that it is based solely on principles of agency—actually undermines the result reached by the court of appeals. While the co-conspirator may or may not remain allied with the defendant, as his former principal the defendant is in a poor position to insist that the prosecution produce the declarant rather than the defense.

In substantial part, respondent's brief appears to be an attack upon the co-conspirator rule on the ground that it allows the admission of unreliable hearsay. However, the question in this case is not whether it would be advisable to reformulate the fed-

eral co-conspirator rule. We disagree with respondent's assessment of the rule, but in any event his argument would be more appropriately directed to Congress or the Advisory Committee on the Rules of Evidence.

C. Costs and Benefits of a Requirement That Unavailability be Shown

In our opening brief, we explained that the rule adopted by the court of appeals would produce very little legitimate benefit for criminal defendants, while imposing a substantial burden on the prosecution and the entire judicial system. These arguments are largely unanswered in respondent's brief.

1. *Benefit to defendants.* The court of appeals held that a co-conspirator statement may be introduced if the government a) "produces[s] the declarant[] for cross-examination" (Pet. App. 12a) or b) shows that the declarant is unavailable. Thus, as we observed in our opening brief (at 41), the court of appeals' rule cannot be justified on the ground that it keeps out an inferior type of evidence, because under that rule co-conspirator statements will always be admitted provided that the prosecution jumps through the prescribed hoops—*i.e.*, either produces the declarant or shows to the court's satisfaction that the declarant is unavailable. Consequently, if the court of appeals' rule would benefit defendants at all, it must be because of the additional evidence that it may bring in. On examination, however, it seems quite clear that the court of appeals' rule will bring in little if any additional testimony favorable to the defense. The effect of the court of appeals' rule in this regard is illustrated by the following chart:

EFFECT OF COURT OF APPEALS' RULE ON AVAILABILITY OF ADDITIONAL TESTIMONY

No additional testimony with respect to the following co-conspirator/declarants:	Additional testimony with respect to following co-conspirator/declarants:
Those who would be called anyway by prosecution or defense.	Those, if any, who a) can be found *and* b) will not refuse to testify *and* c) would not be subpoenaed by either side (as regular or hostile witness) *but* d) would be questioned by defense if produced by government
Those who would refuse to testify if called.	
Those who cannot be found.	
Those whom defense would not want to question even if produced by prosecution.	

It is evident that exceedingly few declarants will fall into the category represented by the right column of the chart and therefore that the court of appeals' rule will produce little if any additional testimony of potential value to the defense. If the defense does not wish to call a witness to testify either as a regular or hostile witness, it is difficult to understand why the defense would want to question the witness if produced by the government in accordance with the court of appeals' new rule. In the present case, for example, if respondent really wanted to question the co-conspirator/declarant Lazaro, it is difficult to understand why the defense did not subpoena Lazaro or make any other efforts to secure his testimony. Certainly it cannot be, as respondent repeatedly asserts, so that the right of cross-examination is preserved, for Fed. R. Evid. 806 expressly provides that "[i]f the party against whom a hearsay statement has been admitted calls the declarant as a witness,

the party is entitled to examine him on the statement as if under cross-examination."

Although we posed these questions in our opening brief, respondent has not provided a plausible answer. Respondent's only explanation (Br. 38) is the following:

> In the case here the defendant cross-examined both McKeon and Mrs. Lazaro [co-conspirator/declarants who testified for the government] at length and was prepared to cross-examine Mr. Lazaro had the government called him * * *.

This answer is clearly not responsive to our argument. If John Lazaro had testified for the government and given testimony damaging to the defense, one would expect defense counsel to cross-examine him in an effort to negate or limit the damage. The question that is posed by our analysis is not whether respondent would have cross-examined John Lazaro if he had testified for the prosecution but ~~whether~~ the defense had any independent desire to secure Lazaro's testimony, employ the procedures available to it for that purpose.

2. *Burden on the government and the judicial process.* In our opening brief (at 40-41), we noted that the court of appeals left unclear whether its new rule requires only that the prosecution bring the co-conspirator/declarant to the courthouse or whether the prosecution must actually place him on the stand as its witness. If the court of appeals was concerned solely with the production of the declarant, we do not understand why this question should not be addressed under the Compulsory Process Clause rather than the Confrontation Clause. On the other hand, if the court of appeals' rule requires the prosecution

to conduct some kind of direct examination of the declarant, this procedure would disrupt the adversary process and create a severe potential for jury confusion. Respondent's brief does nothing to clarify this important issue.

Even if production of the declarant is all that is required, the court of appeals' rule, as we explained in our opening brief (at 37-40), would impose substantial burdens on the prosecution and the judicial system as a whole. First, there is the burden and disruption of having to transport large numbers of co-conspirator/declarants to the courthouse. Often these individuals will be incarcerated in institutions remote from the scene of trial, and therefore transporting them to court will be burdensome for prison officials and the marshals, as well as occasioning an increased risk of escape. Respondent's only answer to this point (see Br. 37 n.15) is that the legal mechanisms for producing an incarcerated witness "have long been readily available." Our point, however, had nothing to do with the availability of a legal mechanism for producing an incarcerated inidvidual but the practical burden of having to do so when neither party affirmatively desires testimony from the individual.

Where the declarant is not incarcerated, the burden and disruption caused by the court of appeals' production requirement may be just as great or greater. Such declarants will often have a strong desire not to testify because of sympathy for or fear of the defendant. Accordingly, it is entirely predictable that many such declarants will make it as hard as they can for the government to discharge the production burden imposed by the court of appeals. The seemingly evasive behavior of John Lazaro in this case is a foretaste, we think, of what will frequently

occur if the decision below is affirmed. If a witness is not incarcerated and does not wish to appear in court, the government has no ability to compel his attendance until he has disobeyed at least one subpoena and a bench warrant has been issued. By that point, of course, the court proceedings will have already been disrupted at least once.[3]

The second burden caused by the court of appeals' rule is that of demonstrating on the record that a declarant is not available to testify. This may involve two different problems. In some cases—for example, those in which the government wishes to introduce statements contained in tape recordings of electronic surveillance—it may be very burdensome for the government to establish on the record that it has exhausted all reasonable means of identifying unknown participants in a conspiratorial conversation. Consider for example a case in which members of a drug distribution conspiracy discuss plans for distributing drugs, and one of the participants

[3] Respondent seeks to minimize the burden of the court of appeals' rule by observing (Br. 37) that "in some circumstances" the government would not have to bring a declarant to court but "could show its good faith efforts to produce through the simple procedure of presenting an affidavit from the declarant establishing that he would claim the privilege." But respondent ignores the obvious fact that many co-conspirator declarants will not obligingly execute such affidavits. Those who are incarcerated may view a trip to court as a welcome escape from the daily routine; others may refuse to execute an affidavit out of simple hostility for the prosecution or because they want to assist the defense by making the prosecution's task as difficult as possible. While this procedure is convenient for respondent to espouse here, we doubt that future defendants will so meekly acquiesce; nor is it clear that the affidavit procedure could be forced upon them. See U.S. Br. 40 n.36.

in the conversation is an unknown conspirator whom the other conspirators address by nickname or by his first name—let us say "Pete." The potential scope of an investigation to ascertain the identity of "Pete" is obviously vast. How many persons associated with the known conspirators must be questioned? How many persons must be asked to listen to the tape? If the known conspirators are found to have numerous friends and associates by the name of "Pete" or "Peter," must they all be tracked down? If the tape contains internal leads regarding "Pete's" identity—if for example it seems to reveal his occupation or city of residence—how far must those leads be pursued? Problems similar to these have already arisen. In *United States* v. *Ordonez*, 737 F.2d 793, 802 (9th Cir. 1984), the court held that the Confrontation Clause was violated because the government introduced drug ledgers containing entries made by unidentified co-conspirators without demonstrating to the court's satisfaction that it was totally unable to identify these conspirators. The court did not explain, however, precisely what steps it believed the government was obligated to take to discharge this burden.

Some co-conspirator declarants, while identifiable, may not be locatable, and thus the government would be compelled under the decision below to demonstrate to the satisfaction of the trial court—and ultimately the appellate courts—that all reasonable efforts had been made to locate and assure the availability of the declarant. Respondent cites *Ohio* v. *Roberts* (Br. 36 n. 14) to show that this obligation is not "unduly burdensome," but to us that case well illustrates the great burdens this rule will in fact impose on the courts. In *Roberts*, the state ultimately succeeded (over three dissents in this Court) in establishing

that the witness in question could not reasonably be found—but not before the state had litigated the issue at three levels in the state courts, as well as before this Court.

Furthermore, even if it can be established that a declarant cannot be found at the time of trial, a contention may be made that the declarant slipped away because the government did not take sufficient steps to monitor his whereabouts. See *Motes* v. *United States*, 178 U.S. 458 (1900). Requiring the government to show everything it did to keep tabs on the declarant during the weeks or months before trial would be a considerable burden. And what steps the courts would regard as sufficient is of course as yet unknown.

II.

In our opening brief (at 44-46), we contended that even if a showing of unavailability were required, the court of appeals erred in ordering a new trial instead of first remanding for a hearing on John Lazaro's availability. If Lazaro was unavailable, we argued, respondent was not prejudiced and a new trial should not be ordered.

Respondent defends the court of appeals' disposition on two principal grounds. First, he argues (Br. 40 (emphasis in original)) that "the government *had and declined* its opportunity in the trial court to prove unavailability or produce the declarant" and that the government should not get "a second bite at an apple it once rejected."[4] This argument would

[4] While the court of appeals ultimately came to a different conclusion, it was not necessarily clear to the prosecutor at the time that Lazaro's statement to her that he would refuse to testify—relayed by her to the court—was inadequate to establish his unavailability. See J.A. 18-19.

unreasonably penalize the government. At the time of trial the government had perfectly reasonable grounds for believing that proof of Lazaro's unavailability was not required. Not only had the trial court implicitly so held (see U.S. Br. 5), but nearly 200 years of practice permitted the admission of co-conspirator statements without any showing of unavailability. Moreover, even if the government could be faulted for not satisfactorily demonstrating Lazaro's unavailability, such an error would not explain why the judicial process and society should be penalized by depriving the trier of fact of evidence probative of respondent's guilt. Unless Lazaro would have testified at trial and given material testimony favorable to the defense, the government's alleged error in failing to produce him in court did not prejudice respondent and accordingly should afford no reason to disturb respondent's conviction.

Respondent also contends (Br. 41) that a remand hearing "would be completely inadequate as a device for resolving the question whether [Lazaro] would have testified." Respondent argues that Lazaro had no legal basis for refusing to testify and therefore that the question that would have to be resolved on remand is whether he was willing to stand in contempt. This argument is plainly incorrect. At the time of trial, Lazaro had been convicted of related state charges, but he could have been prosecuted for federal offenses similar to those charged against respondent. Consequently, Lazaro's entitlement to claim the Fifth Amendment privilege seems clear. If this Court adopts the Confrontation Clause rule crafted by the court of appeals, the government should not be deprived on remand of the opportunity to show

beyond a reasonable doubt that production of Lazaro in the courtroom would not have altered the outcome of the trial.[5]

CONCLUSION

For these reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

NOVEMBER 1985

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[5] Respondent also contends (Br. 40 n.16) that the government waived its right to object to the relief ordered by the court of appeals—a new trial—because the government did not address this issue until after the court's decision was announced. This is surely an extreme application of the rule that arguments ordinarily should not be raised for the first time on rehearing. Until the court of appeals handed down its decision, the government did not know whether the court would find a Confrontation Clause violation, much less that it would order what in our view is entirely inappropriate, wasteful, and excessive relief. We are not aware of a rule requiring appellees to anticipate and brief all forms of unwarranted relief that an appellate court might impose.

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